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No. 84-438-CSX
Status: GRANTED

Title: Superintendent, Massachusetts Correctional Institution, Walpole, Petitioner
v.
Gerald Hill and Joseph Crawford

Docketed:
September 17, 1984

Court: Supreme Judicial Court of Massachusetts

Counsel for petitioner: Smith,Barbara A. H.

Counsel for respondent: Sabino,Jamie Ann

Entry	Date	Note	Proceedings and Orders
1	Sep 17 1984	G	Petition for writ of certiorari filed.
2	Oct 23 1984		Brief of respondents Gerald Hill, et al. in opposition filed.
3	Oct 23 1984	G	Motion of respondents for leave to proceed in forma pauperis filed.
4	Oct 24 1984		DISTRIBUTED. November 9, 1984
5	Nov 13 1984		Motion of respondents for leave to proceed in forma pauperis GRANTED.
6	Nov 13 1984		Petition GRANTED.
			**********
7	Nov 24 1984	G	Motion of respondents for appointment of counsel filed.
8	Dec 3 1984		DISTRIBUTED. December 7, 1984. (Above motion).
9	Dec 10 1984		Motion for appointment of counsel GRANTED and it is ordered that Jamie Ann Sabino, Esq., of Wellesley, Massachusetts, is appointed to serve as counsel for the respondents in this case.
10	Dec 29 1984		Joint appendix filed.
11	Dec 29 1984		Brief of petitioner Supt., MA Corr. Inst. filed.
12	Dec 31 1984		Brief amicus curiae of United States filed.
13	Jan 8 1985		Brief amicus curiae of California, et al. filed.
14	Jan 16 1985		Record filed.
15	Jan 16 1985		Record filed.
16	Feb 8 1985		Brief of respondents Gerald Hill, et al. filed.
17	Feb 5 1985		SET FOR ARGUMENT. Monday, March 25, 1985. (2nd case).
18	Feb 21 1985		CIRCULATED.
19	Mar 18 1985	X	Reply brief of petitioner Supt., MA Correctional Institution filed.
20	Mar 19 1985		Lodging received from counsel for petitioner.
21	Mar 25 1985		ARGUED.

PETITION FOR WRIT OF CERTIORARI

84-438

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ALEXANDER L. STEVAS
CLERK

No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES

SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTION,
WALPOLE,
Petitioner

v.

GERALD HILL AND JOSEPH CRAWFORD,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE MASSACHUSETTS
SUPREME JUDICIAL COURT

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59pp

QUESTIONS PRESENTED

I. Whether prison inmates have a substantive due process right to judicial review of prison disciplinary board findings?

II. Whether, under the due process clause, the findings of a prison disciplinary board should be reviewed under a standard more stringent than review for action which is arbitrary, capricious, or an abuse of discretion?

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IN THE SUPREME COURT
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SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTION,
WALPOLE,
Petitioner

v.

GERALD HILL AND JOSEPH CRAWFORD,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE MASSACHUSETTS
SUPREME JUDICIAL COURT

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court, Gerald Hill v. Superintendent, Massachusetts Correctional Institution, Walpole (and a companion case), is reported at 392 Mass. 196, ___ N.E.2d ___ (Mass. 1984). (App. A).

The trial judge's Memorandum And Order is unreported. Joseph Crawford and Gerald Hill v. Joseph Ponte, Civil No. 136746 and 136747 (Norfolk, SS. January 25, 1983). (App. B).

JURISDICTION

The decision of the Massachusetts Supreme Judicial Court was issued June 19, 1984, affirming the judgment for the plaintiffs dated January 28, 1983. The jurisdiction of this Court is claimed under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in this case is the following clause of the Fourteenth Amendment to the Constitution of the United States:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

On May 2, 1982, Gerald Hill and Joseph Crawford, inmates at the Massachusetts Correctional Institution ("M.C.I."), Walpole, each received a prison disciplinary report. Hill and Crawford were each charged with 1) fighting with, assaulting or threatening another inmate, 2) use of obscene, abusive or threatening language, action, or gesture to an inmate, and 3) attempting to commit, aiding another to commit, or making plans to commit the foregoing offenses.

On May 11, 1982, Crawford and Hill each received a disciplinary hearing regarding the above charges. At Hill's hearing, the board considered the testimony and report from the reporting

officer, Sergeant Maguire. Maguire heard an inmate twice say loudly, "What's going on?" He saw some commotion close to the other side of a door that had a window through which he had been looking. Upon immediate investigation, Maguire found an inmate (Peter Stephens) bleeding from his mouth and suffering from a swollen eye. Dirt was strewn about the area, which was enclosed by a chain link fence. Maguire saw only three inmates other than the victim within the bounded area, and they were jogging away together. Two of the three jogging inmates were Hill and Crawford. Hill testified that he knew nothing about the incident. He also offered an affidavit from the assaulted inmate stating that "Gerald Hill had nothing to do with my present injuries."

At Crawford's hearing, the board heard essentially the same evidence from Sergeant Maguire. Crawford testified that he did not know what happened and that he had been checked for signs of a scuffle and nothing was found. Crawford further stated that the victim had written an affidavit stating that Crawford was innocent.

The board found that Hill and Crawford, along with the third inmate observed by Maguire, had planned, aided, or participated in the charged assault. The board combined all of the charges into one offense, and recommended sanctions of fifteen days in isolation and 100 days loss of good time for Hill and Crawford. On May 20, 1982, Joseph Ponte, Superintendent of M.C.I.,

Walpole, denied each inmate's appeal of the disciplinary board's findings.

On June 8, 1982, Hill and Crawford filed pro se complaints in Norfolk Superior Court claiming that the disciplinary board's findings had violated their federal constitutional rights because they were not supported by the evidence before the board. On December 28, 1982, the defendant, Superintendent of M.C.I., Walpole, moved for Summary Judgment. On January 28, 1983, after submission of pertinent records and affidavits, the court denied the Superintendent's Motion For Summary Judgment and granted Summary Judgment in favor of Hill and Crawford, "voiding" the findings of the disciplinary board and restoring lost good time.

On appeal, the Supreme Judicial Court held that, under the Due Process Clause of the United States Constitution, prison inmates are entitled to judicial review of the sufficiency of the evidence supporting a disciplinary board's findings. Affirming the ruling of the Superior Court, the Supreme Judicial Court held that there was insufficient evidence to permit the disciplinary board's findings.

On July 24, 1984, the court allowed the superintendent's Motion To Stay Rescript pending resolution of this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The writ should be granted to resolve an important question of constitutional law which has caused

conflict among state and federal courts. The Massachusetts Supreme Judicial Court held that a prisoner's constitutional right to judicial review of disciplinary board findings is a logical extension of this Court's holding in Wolff v. McDonnell, 418 U.S. 539 (1974). The Fifth, Seventh, Eighth, and Eleventh Circuits have all subscribed to this view. See, e.g., Smith v. Rabalais, 659 F.2d 539, 545 (5th Cir. 1981), cert. denied, 455 U.S. 992 (1982); Chavis v. Rowe, 643 F.2d 1281, 1287 (7th Cir.), cert. denied sub nom. Boles v. Chavis, 454 U.S. 907 (1981); Wilwording v. Swenson, 502 F.2d 844, 851 (8th Cir. 1974), cert. denied, 420 U.S. 412 (1975); Inglese v. Warden, 687 F.2d 362, 363 (11th Cir. 1982). The

Third Circuit has affirmed, without opinion, a federal district court decision which reviewed a prison disciplinary board's finding for sufficiency of the evidence. Edwards v. White, 501 F.Supp. 8, 11 (M.D.Pa. 1979), aff'd, 633 F.2d 209 and 633 F.2d 212 (3rd Cir. 1980).

However, the Fourth Circuit has twice affirmed, without opinions, federal district court holdings that a federal court should not review the fact findings of, or sufficiency of the evidence before, prison disciplinary boards. Russell v. Division of Corrections, Comm. of Virginia, 392 F.Supp. 476, 477 (W.D.Va), aff'd, 530 F.2d 969 (4th Cir. 1975); Pollard v. Baskerville, 481 F.Supp. 1157, 1158

(E.D.Va. 1979), aff'd., 620 F.2d 294 (4th Cir. 1980). See also Flythe v. Davis, 407 F.Supp. 127, 138 (E.D.Va. 1976) ("Federal courts will not serve as a reviewing board over the accuracy of a disciplinary committee's findings of fact."), citing the unpublished opinion in Woodard v. Mills, 511 F.2d 1399 (4th Cir. 1975).

At least two states have disagreed with the Massachusetts Supreme Judicial Court's "logical" extension of Wolff. Following a careful analysis of Wolff and its antecedents, Morrissey v. Brewer, 408 U.S. 471 (1972), and Goldberg v. Kelly, 397 U.S. 254 (1970), the Supreme Court of Indiana concluded that there is no constitutionally

protected right to judicial review of a prison disciplinary board's factual findings. Riner v. Raines, 409 N.E.2d 575, 577-79 (Ind. 1980). There is thus an apparent conflict between Indiana law and the federal circuit court holdings in the Seventh Circuit. And, in Robson v. Biester, 53 Pa. Commw. Ct. 587, 420 A.2d 9, 12 (Commw. Ct. 1980), the Commonwealth Court of Pennsylvania declined to engage in a review of the sufficiency of the evidence or findings of fact at a prison disciplinary proceeding. This holding apparently conflicts with the law in the Third Circuit. See also McQueen v. Vincent, 53 A.D.2d 630, 384 N.Y.S.2d 475, 476 (App. Div. 1976) (due process review of prison disciplinary proceeding does not

include a review of the merits of the fact finder's findings).

Not only has there been conflict over whether a prisoner has a constitutional right to review of disciplinary board fact-findings, but even those courts which have held that there is such review have disagreed as to the constitutionally required standard of review. The Fifth, Eighth, and Eleventh Circuits will review a prison disciplinary board's finding of fact to determine whether it is supported by "any" evidence. Smith v. Rabalais, supra; Wilwording v. Swenson, supra; Inglese v. Warden, supra. See also Edwards v. White, supra. The Seventh Circuit reviews for "substantial" evidence. Chavis v. Rowe, supra.

II. The decision of the Supreme Judicial Court expands the due process rights of prison inmates with respect to prison disciplinary proceedings beyond those which this Court has heretofore required. Indeed, in holding that an inmate has a federal constitutional right to challenge the fact-findings of a prison disciplinary board, the Massachusetts Supreme Judicial Court has essentially created a substantive due process right by which a prisoner can challenge any prison disciplinary proceeding, regardless of the fact that he has received all of the procedural safeguards to which he is constitutionally entitled.

ARGUMENT

A Prison Inmate Has No General Due Process Right To Judicial Review Of Disciplinary Board Findings For Sufficiency Of The Evidence, And The Creation Of Such A Right Is Not Consistent With Those Principles Enunciated By This Court In The Context Of Prison Administration.

It is well established that there is no general due process right to judicial review of administrative findings. Ortwein v. Schwab, 410 U.S. 656, 659-60 (1973). Indeed, this Court has held that the Federal Constitution does not require appeals even from state criminal convictions. Griffin v. Illinois, 351 U.S. 12, (1956). Hence, this Court has refused to require judicial review in contexts in which an aggrieved party has far weightier interests at stake than do prison inmates. See Hiatt v. Brown, 339

U.S. 103, 110 (1950) (review of court-martial findings for sufficiency of the evidence is not a facet of the Court's limited review for constitutional error); Whelchel v. McDonald, 340 U.S. 122, 124 (same); Ortwein v. Schwab, 410 U.S. at 659-60 (due process does not require judicial review of a state administrative proceeding resulting in termination of welfare benefits).

Without so much as a discussion of the fact that there is no general constitutional right to judicial review of administrative findings, the Massachusetts Supreme Judicial Court held that a constitutional "entitlement" to judicial review of prison disciplinary board findings for

sufficiency of the evidence "logically follows" from this Court's holding in Wolff v. McDonnell, 418 U.S. 539 (1974). Hill v. Superintendent, 392 Mass. at 201. However, no logical precedent for such a constitutional ruling can be found in Wolff.

In Wolff, this Court balanced the state's weighty interest in maintaining strict order, and insuring swift and sure punishment for disciplinary offenses, in the sensitive prison environment, against a prison inmate's lawfully diminished liberty interests. The Court held that inmates are entitled only to minimal due process rights in connection with disciplinary action. Wolff v. McDonnell, 418 U.S. at 561-64, 571. Quoting Morrissey v. Brewer, 408

U.S. 471, 489 (1972), the Court held that such rights include "'a written statement by factfinders as to the evidence relied on and reasons' for the disciplinary action." 418 U.S. at 564. However, this Court never required any kind of lengthy formal statement of findings of fact and conclusions of law. Cf. Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (In Goldberg, relied on heavily in Morrissey, the Court held that though due process requires a statement of the decision-maker's reasons for his determination and evidence relied on at welfare termination proceedings, such statement "need not amount to a full opinion or

even formal findings of fact and conclusions of law.")[1/] Moreover, Wolff allows prison administrators the discretion to exclude from their statement of evidence those items of evidence which might implicate institutional or personal safety. 418 U.S. at 565. And, Wolff does not afford prisoners with the traditional tools for testing the strength of the evidence against them, such as the right to confrontation, cross-examination, or counsel, nor even with an unqualified

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1/ It bears repeating that although, in Goldberg v. Kelly, supra, this Court required certain procedural safeguards prior to termination of welfare benefits, the Court has refused to hold that welfare recipients have a concomitant due process right to judicial review of the findings made at pre-termination administrative proceedings. Ortwein v. Schwab, 410 U.S. at 659-60 and n.4.

right to present countervailing evidence in their defense. 418 U.S. at 566-70. In light of the summary and flexible procedures which this Court has required in prison disciplinary proceedings, it is hardly logical to conclude that the Court ever contemplated that a disciplinary board's substantive findings should, as a matter of constitutional law, be subject to formal judicial review for "legal sufficiency of the evidence." See, Hill v. Superintendent, 392 Mass. at 202.

Considerable confusion remains as to what such formal judicial review entails. The Supreme Judicial Court reviewed the evidence in Hill to determine "whether there was some evidence which, if believed, would

rationally permit the [disciplinary] board's findings." Hill v. Superintendent, 392 Mass. at 203. The standard is ostensibly less demanding than review for "substantial evidence," which gauges the reasonableness of the fact-finder's determination based on all the evidence presented at the hearing. See Jackson v. Carlson, 707 F.2d 943, 949 (7th Cir. 1983); Hill v. Superintendent, 392 Mass. at 203, n.5. The standard applied by the Supreme Judicial Court is, however, more stringent than the "any evidence" standard, which is akin to review to determine whether administrative action is arbitrary, capricious, or an abuse of discretion. See Smith v. Rabalais, 659 F.2d at 545. The Supreme Judicial Court

took its review one step past the question whether there was "any" evidence to support the board's findings, which there clearly was, to the question whether that evidence was "legally sufficient." Hill v. Superintendent, 392 Mass. at 202 and 204. Whether "legal sufficiency" entails review of the quantum of evidence, or the nature of the evidence, or even the admissibility of the evidence, is never explained in Hill.

The inescapable effect of the Supreme Judicial Court's ruling is to expose to judicial scrutiny every single prison disciplinary action which implicates some liberty interest, regardless of the fact that, as in this case, an inmate received the full

panoply of procedural protections set forth in Wolff. The courts will therefore be exposed to a heavy burden of new litigation, and the Department of Correction will likely be forced to divert resources from the day-to-day needs of prison administration to implement more formal, trial-type disciplinary hearings. The Supreme Judicial Court paid little heed to this concern, Hill v. Superintendent, 392 Mass. at 202, despite this Court's repeated statements noting its importance in the due process calculus. See, Parham v. J.R., 442 U.S. 584 at 605-606 & n.14 (1979); Goss v. Lopez, 419 U.S. 565, 583 (1975); Wolff v. McDonnell, 418 U.S. at 569-70.

In moving beyond the procedural safeguards outlined in Wolff to substantive review of the findings of prison disciplinary boards for sufficiency of the evidence, the ruling in Hill not only expanded the constitutional rights of prison inmates, but altered their nature. This was done with little regard for this Court's repeated admonition to the judiciary not to place itself in the position of second-guessing the conclusions of prison administrators, who "have a better grasp of [their] domain than [a] reviewing judge..." Bell v. Wolfish, 441 U.S. 520, 548 (1979); See, Procunier v. Martinez, 416 U.S. 396, 404-405 (1974); Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 132

(1977); Hewitt v. Helms, ____ U.S. ____, 103 S.Ct. 864, 872-73 (1983).

The ultimate outcome in Hill attests to the wisdom of that admonition.

CONCLUSION

Based on the foregoing, the writ of certiorari should issue to review the decision of the Massachusetts Supreme Judicial Court.

Respectfully submitted,

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Dated: September 14, 1984

APPENDIX A

GERALD HILL v. SUPERINTENDENT,
MASSACHUSETTS
CORRECTIONAL INSTITUTION, WALPOLE
(and a companion case[1]).

Norfolk, December 5, 1983 - June 19, 1984

Present: Hennessey, C.J., Wilkins,
Liacos, Nolan, & O'Connor, JJ.

CIVIL ACTIONS commenced in the Superior Court Department on June 9, 1982.

The cases were heard by Zobel, J., on motions for summary judgment.

After review was sought in the Appeals Court, the Supreme Judicial Court ordered direct appellate review on its own initiative.

Jamie Ann Sabino for Joseph Crawford.

1/ Joseph Crawford v. Superintendent, Massachusetts Correctional Institution, Walpole.

Martin E. Levin, Assistant Attorney General, for the defendant.

O'CONNOR, J. While incarcerated at the Massachusetts Correctional Institution at Walpole (M.C.I., Walpole), the plaintiffs, Gerald Hill and Joseph Crawford, filed pro se complaints in the Superior Court claiming that the evidence presented at a prison disciplinary board hearing was constitutionally inadequate to warrant the board's determination that the plaintiffs had been involved in an assault on another inmate in violation of prison rules.[2/] In the Superior

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2/ The complaints are entitled "writ of habeas corpus ad testificandum." The defendant does not challenge the form of the complaints. The actions should have been brought as civil actions in the nature of certiorari pursuant to G.L. c.

(footnote continued)

Court, they sought restoration of the 100 days of good time credits which the board had taken from them as punishment for their involvement in the assault, and they sought expungement from their prison records of all reference to the incident. After filing an answer in each case, the defendant superintendent of M.C.I., Walpole, moved in each case for summary judgment. A judge of the Superior Court ruled that the board's

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(footnote continued)

249, §4. See Boston Edison Co. v. Selectmen of Concord, 355 Mass. 79, 83 (1968); Cepulonis v. Commissioner of Correction, 15 Mass. App. Ct. 292 (1983).

The plaintiff's arguments are based solely on the United States Constitution. They make no claims under the Massachusetts Constitution, nor do they rely on any rules and regulations promulgated by the Department of Correction as supporting their right to judicial review of the adequacy of the evidence to warrant the disciplinary board's findings.

findings were not adequately supported by the evidence and denied the superintendent's motions for summary judgment. The judge ordered the entry of judgments for the plaintiffs vacating the board's findings, nullifying the sanctions that had been imposed, and restoring the plaintiffs' good time credits. The superintendent appealed in each case, arguing that (1) the judge erred in reviewing the board's findings for the sufficiency of the evidence because there is no constitutional right to judicial review of a disciplinary board's findings;[3/] and (2) even if such a right exists, the judge erred in

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3/ There is no statutory right of review. Decisions of the Department of Correction are not reviewable under G.L. c. 30A, §14. See G.L. c. 30A, §§ 1, 1A.

holding that there was insufficient evidence in these cases to warrant the board's findings. After entry of the appeals in the Appeals Court, we transferred the appeals to this court on our own motion. We hold that there was no error. We affirm the judgments of the Superior Court.

The plaintiffs were charged in disciplinary reports with assaulting another inmate in violation of prison rules.[4/] The disciplinary board

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4/ The plaintiffs were charged with the following disciplinary offenses which are found in 103 Code Mass. Regs. §430.22 (18), (19), and (31) (1978):

"(18) Fighting with, assaulting or threatening another person with any offense against his person or property.

"(19) Use of obscene, abusive, or threatening language, action or gesture to any inmate or staff member.

(footnote continued)

held a separate hearing on the charges against each plaintiff. At each hearing, some exculpatory evidence was introduced. The board relied on other evidence, however, for its determinations that the plaintiffs had participated in an assault. That evidence consisted of testimony of Sergeant Maguire, who was a prison guard, and his written disciplinary report. The report presented in each case stated that on May 2, 1982, Maguire heard an inmate twice say loudly, "What's going on?" He saw some commotion close to the other side of a

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(footnote continued)

"(31) Attempting to commit any of the above offenses, aiding another person to commit any of the above offenses, making plans to commit any of the above offenses, shall be considered the same as commission of the offense itself."

door that had a window through which he had been looking. According to the report, Maguire quickly investigated and found an inmate bleeding from his mouth and suffering from a swollen eye. Dirt was strewn about the area, which was enclosed by a chain link fence. There were only three inmates other than the victim in the area at this time, and they were jogging away. Two of them were the plaintiffs. From these observations, Maguire concluded that "one or more of these inmates did assault [the victim] and apparently acted as a group as they were all jogging away from the scene together." Maguire's testimony at each hearing was substantially in accord with his report. We turn now to the merits of these appeals.

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The rights and privileges that citizens ordinarily enjoy are necessarily diminished with respect to prison inmates, but an inmate is "not wholly stripped of constitutional protections." Wolff v. McDonnell, 418 U.S. 539, 555 (1974). In Wolff, the Supreme Court held that procedural due process requires that before an inmate can be deprived of a State-created liberty interest, he must be given advance written notice of the claimed violation, an opportunity to call witnesses and present evidence in the absence of undue hazard to institutional safety or correctional goals, and a written statement of the evidence relied on by the fact-finder and the reasons for any disciplinary action taken. Id.

at 563-567. "Massachusetts provides that every prisoner 'whose record of conduct shows that he has faithfully observed all the rules of his place of confinement' has a statutory right to have 'the term of his imprisonment reduced by a deduction . . .' of a determined period of time from his sentence. G.L. c. 127 §§129, 129C, and 129D. Such good time credits may be forfeited '[i]f a prisoner violates any rule of his place of confinement.' G.L. c. 127, §129, par. 1. The loss of such statutory good time credits affects a State-created liberty interest protected by the due process guarantees of the United States Constitution." Nelson v. Commissioner of Correction, 390 Mass. 379, 389 (1983).

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The Supreme Court in Wolff was not required to rule, nor did it do so, on whether an inmate who is deprived of a State-created liberty interest by a disciplinary board is constitutionally entitled to judicial review of the sufficiency of the evidence to warrant the board's findings. However, such an entitlement logically follows from the court's holding with respect to the requirements of procedural due process, together with its reasoning that "a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly" (emphasis added). Wolff v. McDonnell, supra at 565.

Since "[t]he touchstone of due process is protection of the individual against arbitrary action," id. at 558, we conclude that before a prison inmate can be deprived of good time credits, in which he has a State-created liberty interest protected by due process guarantees of the United States Constitution, he is entitled not only to the procedural due process articulated in Wolff, but to judicial review of the sufficiency of the evidence to warrant the findings of the disciplinary board as well. Accord Smith v. Rabalais, 659 F.2d 539, 545 (5th Cir. 1981), cert. denied, 455 U.S. 992 (1982); Wilwording v. Swenson, 502 F.2d 844, 851 (8th Cir. 1974), cert. denied, 420 U.S. 912 (1975). Independent review is necessary

to protect inmates against decisions affecting their liberty interests which may be made by prison officials in good faith, but nevertheless without legally adequate evidence to support them. Such review does not involve a de novo evidentiary hearing before a judge nor does it involve judicial second guessing with respect to the credibility of witnesses or the adoption of inferences. Judicial review is to be limited to the legal sufficiency of the evidence to support the disciplinary board's findings.

The defendant predicts substantial cost increases to the Department of Correction flowing from the necessity to keep meticulous records, and to the courts as well, if we rule that judicial

review of disciplinary board findings leading to the deprivation of good time credits is constitutionally required. We are not persuaded that the Department's record keeping costs will increase as a result of our recognizing inmates' rights to judicial review. Written records of disciplinary board proceedings are constitutionally required in any event. Wolff v. McDonnell, supra at 563-567. Undoubtedly, implementation of a right to judicial review will involve costs to the courts, and perhaps to the Department of Correction, but that consideration cannot justify a failure to ensure fundamental fairness in disciplinary proceedings.

Contrary to the defendant's argument, the availability of judicial review will not undercut the correctional goal of swift and sure punishment for misconduct in the prison setting. The forfeiture of good time credits does not ordinarily result in swift punishment because its impact is not felt by the inmate until, but for the forfeiture, his period of incarceration would be at an end.

The defendant presents two further arguments, the first being that since the Department of Correction is not subject to section 14 of the State Administrative Procedure Act, G.L. c. 30A, providing for judicial review of the decisions of administrative agencies, see G.L. c. 30A, §§1, and 1A,

the Legislature's intent that there be no judicial review in the circumstances of this case is clear. We do not consider the exclusion of the Department of Correction from G.L. c. 30A, §14, as indicating a legislative intent that inmates shall not be entitled to judicial review of the sufficiency of the evidence to warrant the findings of a disciplinary board resulting in the loss of good time credits, particularly in view of our conclusion that inmates have a constitutional right to such review.

The defendant's final argument with respect to the availability of judicial review is that prison cases should get no greater judicial review than do military cases and, the defendant says,

military cases do not receive judicial review of the sufficiency of the evidence to warrant court-martial findings. We will assume, in the defendant's favor, that judicial review is not available to determine the sufficiency of the evidence relied on by a military tribunal as the basis for its findings. The fact that Federal or State court review is unavailable in the military context, however, is not persuasive. No contention has been made that adequate review is not available within the system of military courts created by Congress.

The trial judge reviewed the evidence to determine whether there was some evidence which, if believed, would

rationally permit the board's findings.[5/] He concluded that such evidence had not been produced. We agree. The evidence, viewed as favorably to the defendant as logic will permit, demonstrates only that the plaintiffs, in the company of a third undisclosed inmate, were the only

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5/ An alternative standard of review would be whether the board's findings were supported by "substantial evidence." Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion," taking "into account whatever in the record fairly detracts from its weight." New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 466 (1981), quoting Boston Edison Co. v. Selectmen of Concord, 355 Mass. 79, 92 (1968), and Cohen v. Board of Registration in Pharmacy, 350 Mass. 246, 253 (1966). In view of our conclusion that the trial judge rightly decided that the board's findings failed to meet the more lenient "some evidence" test, we need not decide whether that test or a stricter test is more appropriate.

inmates seen by the guard in the fenced area with the inmate who had been beaten, and that they fled the scene when the guard appeared. Of course, evidence of consciousness of guilt, together with other sufficiently probative evidence, may warrant a finding of guilt. Commonwealth v. Montecalvo, 367 Mass. 46, 55 (1975). However, even if the plaintiffs' flight could be considered as demonstrating more than the plaintiffs' reluctance either to inform on another inmate or be falsely accused of assault, one cannot fairly infer from the evidence before the board that more than one person struck the injured inmate, or that either plaintiff struck him or otherwise participated in the assault. We

conclude that the judge was correct in reviewing the sufficiency of the evidence to support the disciplinary board's findings, and that he correctly ruled that the evidence was insufficient.

Judgments affirmed.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT

JOSEPH CRAWFORD,
Plaintiff

V. No. 136746

JOSEPH PONTE,
Defendant

and

GERALD HILL

V. No. 136747

JOSEPH PONTE,
Defendant

MEMORANDUM AND ORDER

MEMORANDUM

FACTS

These cases raise the identical issue: Did a disciplinary board receive sufficient evidence to find plaintiff guilty of fighting, using a threatening

language or making a threatening gesture, or assisting another person to commit either of these offences?

The evidence, as stated in the Disciplinary Board's findings, came from a single witness who "heard a commotion, he checked [the victim] was picking himself off the ground, bleeding and hurt. He [i.e. the witness] saw 3 inmates jogging away, among them [Plaintiff]. They were the only three inmates in the area."

On this evidence, the Disciplinary Board concluded that the R/O i.e., Reporting Officer's testimony and observations show an assault occurred, his observation of inmate in the area indicated clear guilt.

DISCUSSION

In evaluating, for due-process-test purposes, the findings of a Disciplinary Board, a court does not grant a de novo hearing; nor does it evaluate the evidence. Instead, it merely ascertains whether the record contains some evidence supporting the Board's conclusion, Inglese v. Warden, 687 F.2d 362, 363 (11th Cir. 1982), bearing in mind that the Board need be persuaded only by a preponderance of the evidence.

Here, the evidence all came from an eyewitness (not an informant) whose testimony, if believed, established:

1. A commotion attracted his attention, but he did not observe fighting;

2. He observed the bleeding victim picking himself off the ground;
3. He observed three inmates (including both plaintiffs) jogging away from the scene; and
4. He observed no other inmates in the vicinity.

To support the Board, defendant relies principally on two decisions, Commonwealth v. Hogan, 375 Mass. 406 (1978), and Commonwealth v. Montecalvo, 367 Mass. 46 (1975).

Certainly, flight is evidence of consciousness of guilt. But flight alone is not evidence of guilt itself. In Commonwealth v. Hogan, supra, the evidence "warranted a finding that defendant thrust a knife into [the victim's] stomach," id. at 407. With

that as a foundation, the jury could infer that defendant's leaving the scene within a minute of the stabbing showed consciousness of guilt. In the present cases, the record contains no evidence analogous to the evidence in Commonwealth v. Hogan, supra, that defendant stabbed the victim.

In Commonwealth v. Montecalvo, supra, the evidence warranted a finding that defendant had been seen with the victim immediately before the crime, id. at 48, 55, at a time and place near where the victim was shortly thereafter found naked in a battered condition, id. at 55. Moreover, during the days after the incident, a friend of defendant's mother, whom he had never before telephoned, received "many, many calls

from defendant, asking about the victim and whether his clothes had been found," id. at 51-52.

In the instant case, the eyewitness did not see either plaintiff before or during the asserted embroglio. Even assuming that his observation of their "jogging away" constitutes evidence of consciousness of guilt - an inference which the foregoing analysis of the decisions shows to be tenuous indeed - the record is bare of any evidence of guilt. To ripen into the latter, the "jogging away" evidence requires "other evidence" id. at 55 linking either of the plaintiffs to an attack on the victim.

One might add, finally, that the record in plaintiff Crawford's case is indeed bare of any evidence that the victim was assaulted. The nature of the victim's injuries (described in the Disciplinary Report, but not in the Board's findings) does not prove an assault, as opposed to a fall; the evidence (again, in the Report but not in the findings) of "other signs of a scuffle (dirt astrewn [sic] in the same area)" does not establish an assault.

As to plaintiff Hill, the pertinent testimony from the Reporting Officer was "[the victim] has been beaten . . . [The officer] asked a medic his opinion how the injury [the victim] received. [sic] Medic states he was beaten."

It is intimated that plaintiff Hill sought to have the medic called to testify; in light of other infirmities in the record, as discussed previously, it is not necessary to consider the effect of any refusal to honor this request.

On the record before me, I conclude, as a matter of law, that the Board's finding of guilty rested, in each case, on no evidence constitutionally adequate to support that finding.

ORDER

Judgment to enter forthwith in each action as follows: The findings of the Disciplinary Board dated May 11, 1982, are voided, and all sanctions imposed pursuant thereto nullified; plaintiff is to be recredited forthwith with the 100

days' good time deducted pursuant to the said Board's findings.

Hiller B. Zobel
Justice of the Superior Court

Dated: January 25, 1983